It will be seen that the law regarding the constitutional right to consult counsel must be reconciled with actual practice with regard to police investigations under the Criminal Procedure Code. It seems to me that as the purpose of detention under section 117 C.P.C. is for the purpose of completing investigations and as the constitutional right to consult counsel "should not be exercised to the detriment of investigation", then for so long as an arrested person is detained under section 117 C.P.C. he cannot exercise his right to consult counsel. I therefore hold that the right to consult counsel begins from the moment of arrest but the exercise of that right is postponed for so long as the arrested person is detained under section 117 C.P.C.

In this case the request to consult counsel was made during the period the plaintiff was under detention under section 117 C.P.C. The plaintiff therefore, could not exercise his right at the material time and consequently there could not be a denial of such right.

In the event I hold that:

(a) the plaintiff was not illegally or unlawfully detained by the defendants at any time;

(b) there was no denial by the defendants of the plaintiff's constitutional right to consult counsel.

The claim for damages accordingly fails and I dismiss the claim with costs.

Claim dismissed.

Solicitors: *Karpal Singh & Wong.*

MICHAEL CHONG NGIAN FONG v. SYARIKAT FONG SAM TIMBER & ANOR.

[O.C.J. (Ajaib Singh J.) January 30, 1976]
[Seremban — Bankruptcy No. 23 of 1975]

Bankruptcy — Procedure — Irregular notice and petition — Notice issued jointly by two judgment creditors — Notice and petition silent on liquidated sum — Whether irregularity curable — Bankruptcy Act, 1967, ss. 3(1)(i), 5(1)(a), 6(2) & 131 — Bankruptcy Rules 1969, r. 91(2) & (3) — Bankruptcy Act, 1883, (U.K.), s. 4(1)(g).

On July 4, 1975, a bankruptcy notice dated June 21, 1975 was served on the debtor (applicant). The notice was based on the judgment of April 21, 1975 which the petitioning creditors had against the debtor in default of defence. The sum of $96,200 payable by the debtor to each of the petitioning creditors under the judgment and interest thereon were set out. In the notice, two further items for interest were also entered but the sums for these were left blank as they referred to interest due up to date of payment. The bankruptcy notice received no response whereupon the petitioning creditors filed a bankruptcy petition dated September 4, 1975 and served on the debtor on September 12, 1975. Before the petition could be heard the debtor applied by notice of motion to set aside both the bankruptcy notice and the bankruptcy petition.

The debtor claimed that the notice was a nullity because it was issued on the basis of two judgment debts owing to the two petitioning creditors and therefore there was no act of bankruptcy upon which the bankruptcy petition could have been issued. It was also contended that the sums claimed were confusing as they did not reflect the judgment on which they were based and that the total amounts claimed in the notice and in the petition did not constitute liquidated sums.

Counsel for the petitioning creditors submitted that the debtor was not misled in any way and that if at all, it was a mere irregularity curable by section 131 of the Bankruptcy Act, 1967.

Held, setting aside the bankruptcy notice and petition: (1) the petitioning creditors had jointly issued the bankruptcy notice against the debtor despite the absence of any provision entitling them to do so under the Bankruptcy Act and they had failed to indicate in the notice as well as in the petition that the debt owing by the debtor was a liquidated sum payable either immediately or at some certain future time;

(2) this amounted to a flagrant disregard of the provisions relating to the issue of the bankruptcy notice and the bankruptcy petition which could not be cured by section 131 of the Bankruptcy Act.

Cases referred to:-

(1) *In Re Low. Ex Parte The Argentine Gold Fields, Limited* [1891] 1 Q.B. 147.

(2) *Re A Debtor (No. 20 of 1953). Ex Parte The Debtor v. Scott & Anor.* [1954] 3 All E.R. 74.

(3) *In re Debtors (No. 669 of 1926)* [1927] 1 Ch. 19.

(4) *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 M.L.J. 233.

BANKRUPTCY.

N. Ramachandran for the applicant/debtor.

Khaw Yew-Mei for the respondents/petitioning creditors.

Ajaib Singh J.: This was an application by the debtor in a bankruptcy petition for an order that the bankruptcy notice issued against him by two petitioning creditors be set aside on the ground of irregularity and that the bankruptcy petition issued against him pursuant to the bankruptcy notice be also set aside on the same ground. Alternatively the applicant prayed that if the court holds that the bankruptcy notice and the bankruptcy petition had been regularly issued the hearing of the bankruptcy petition be stayed pending the hearing and determination of an application on the part of the debtor to set aside the judgment on which the bankruptcy notice and the bankruptcy petition were based.

The circumstances leading to the present application were as follows. In Civil Suit No. 158 of 1974 filed in the Seremban High Court the two petitioning creditors sued the debtor for two sums of money — $96,250 and $25,000 plus interest thereon. In Civil Suit No. 463 of 1974 filed in the Kuala Lumpur High Court the first petitioning creditor sued two individuals trading as Syarikat Jaya Timber Enterprise for the sum of $96,250 and interest thereon and in another Civil Suit No. 464 of 1974 filed in the Kuala Lumpur High Court the second petitioning creditor sued the same two individuals trading as Syarikat Jaya Timber Enterprise for $96,250 and interest thereon. Upon application by the two petitioning creditors in their respective civil suits the two civil suits filed in the Kuala Lumpur High Court were transferred to the Seremban High Court and renumbered here as Civil Suit Nos. 13 and 14 of 1975 respectively. Thereafter all the three suits were consolidated by order of court obtained at the instance of the two petitioning creditors. The two individuals trading as Syarikat Jaya Timber Enterprise did not enter any appearance. The applicant entered an appearance but did not deliver a defence whereupon the two petitioning creditors obtained judgment on April 21, 1975 against all the defendants in

the three consolidated suits by default. The judgment ordered the defendants jointly and severally to pay the petitioning creditors the sum of $96,250 and it ordered the applicant to pay the petitioning creditors a further sum of $25,000. Interest was also ordered to be paid by the defendants at the rate of 5% per annum and 6% per annum until payment. Lastly costs both before and after consolidation of the civil suits were ordered to be paid by the defendants.

On July 4, 1975 a bankruptcy notice dated June 21, 1975 was served on the debtor the applicant in the present proceedings. The notice was based on the judgment of April 21, 1975 and it was issued at the instance of both the petitioning creditors. The sums of $96,250 payable by the debtor to each of the petitioning creditors under the judgment and interest thereon for a certain period were set out in the notice. Two further items for interest were also entered in the notice but the sums of money for these were left blank as they referred to interest due up to the date of payment to the two petitioning creditors.

The bankruptcy notice appears to have gone unheeded whereupon the petitioning creditors filed a bankruptcy petition dated September 4, 1975 and served on the debtor on September 12, 1975. Before the petition could be heard the debtor applied by notice of motion to set aside both the bankruptcy notice and the bankruptcy petition. In his affidavit in support of the application the debtor claimed *inter alia* that the bankruptcy notice was a nullity because it was issued on the basis of two judgment debts owing to the two petitioning creditors and therefore there was no act of bankruptcy upon which the bankruptcy petition could have been issued. It was also alleged that the sums claimed were confusing, that they did not reflect the judgment on which they were based and that the total amounts claimed in the notice and in the petition did not constitute liquidated sums. Mr. N. Ramachandran for the applicant referred to the case of *In Re Low. Ex Parte The Argentine Gold Fields, Limited*[1] for the proposition that a bankruptcy notice cannot be based on two judgments. He also submitted that a bankruptcy notice must be based on a final judgment specifying the exact sum of money due. The notice in the present case did not specify the exact amount due as interest and costs. In support of this submission Mr. Ramachandran cited the case of *Re A Debtor (No. 20 of 1953). Ex Parte The Debtor* v. *Scott & Anor.*[2]

Miss Khaw Yew-Mei for the petitioning creditors submitted that the Bankruptcy Act 1967 did not preclude the issuing of one bankruptcy notice by two or more creditors. She submitted that the debtor was not misled in any way and that if at all this was a mere irregularity which could be cured under section 131 of the Bankruptcy Act.

After giving due consideration to the application and after hearing the submissions of counsel for the parties I decided in favour of the applicant. In the case of *In Re Low. Ex Parte The Argentine Gold Fields, Limited* the judgment creditor sought to issue a bankruptcy notice based on two final judgments and it was held by the Court of Appeal that two or more judgment debts could not be included in a bankruptcy notice under section 4(1)(g) of the United Kingdom Bankruptcy Act 1883. Section 4(1)(g) of this Act is *in pari materia* with section 3(1)(i) of our Bankruptcy Act 1967 which provides for the issue of a bankruptcy notice at the instance of a judgment creditor against a judgment debtor based on a final judgment or final order. The provisions of section 3(1)(i) are clear and admit of no uncertainty or ambiguity. Under these provisions a bankruptcy notice can be based on one final judgment or one final order only. Moreover rule 91(2) of the Bankruptcy Rules 1969 provides specifically that a creditor is not entitled to apply for the issue of a bankruptcy notice by combining two or more final judgments or final orders and rule 91(3) forbids the issue of a bankruptcy notice against joint debtors in a final judgment or final order unless the debtors had carried on business jointly. If the debtors had not carried on business jointly then separate bankruptcy notices have to be issued against the debtors in the final judgment or final order.

The case of *In Re Low* is not on all fours with the present case before me and I think it can be distinguished because unlike the present case *In Re Low* was decided on the distinct ground that a bankruptcy notice cannot be based on two judgments but only on one final judgment. The position in the present case was somewhat different because here although there were two judgment creditors and three judgment debtors there was only one final judgment of April 21, 1975 and in my view the point could not be raised here that the bankruptcy notice was based on two final judgments. But then there was a serious fundamental defect of a different kind in the bankruptcy notice which was issued by the petitioning creditors against the debtor which rendered the notice invalid and of no effect and that defect was that the bankruptcy notice was issued not at the instance of one creditor but two creditors. Under section 3(1)(i) of the Bankruptcy Act 1967 a bankruptcy notice may be issued against a debtor at the instance of one and only one creditor on a final judgment or final order. I think there could have been no objection to the bankruptcy notice if it had been issued by only one of the two creditors based on the amount of money due to that creditor in the judgment of April 21, 1975 but the issue of the bankruptcy notice jointly by both the judgment creditors rendered the notice bad and irregular.

The bankruptcy petition which follows after a debtor has committed an act of bankruptcy is on a different footing. The bankruptcy petition unlike the bankruptcy notice may be presented to the court by one or two or more creditors under section 5(1)(a) of the Bankruptcy Act. This section and the form in the Appendix to the Bankruptcy Act relating to a creditor's petition provide for the presentation of the petition by one or several creditors while section 3(1)(i) and the forms prescribed for the issue of a bankruptcy notice and the request for the issue of a bankruptcy notice speak of only one creditor. The provisions of sections 3(1)(i) and 5(1)(a) of the Bankruptcy Act, rule 91(2) and (3) of the Bankruptcy Rules and the relevant forms prescribed in the Appendix to the Act are to be construed literally. Thus they can mean only what is said therein, namely, that a bankruptcy notice is to be issued by only one creditor against one debtor or against joint debtors if they had carried on

business jointly based on one final judgment or final order but that one or several creditors may join in presenting a bankruptcy petition against a debtor who has committed an act of bankruptcy. In the circumstances therefore I held that the bankruptcy notice was null and void and of no effect on the ground that it was issued jointly by the two judgment creditors for which there was no provision in the Bankruptcy Act. Consequently I held that the bankruptcy petition which followed was of no effect because the bankruptcy notice having been declared a nullity the debtor on whom the notice was served had committed no act of bankruptcy on which the petition could be grounded.

Further under section 5(1)(a) and (b) of the Bankruptcy Act a creditor is not entitled to present a bankruptcy petition against a debtor unless the debt owing by the debtor to the petitioning creditor or creditors amounts to one thousand dollars and is a liquidated sum payable either immediately or at some certain future time. Under section 6(2) of the Bankruptcy Act it is provided that at the hearing of the bankruptcy petition the court shall require proof of the debt of the petitioning creditor, the act of bankruptcy and service of the petition if the debtor does not appear. All the requirements of sections 5(1)(a) and (b) and 6(2) must be satisfied before the court may make a receiving order in pursuance of the bankruptcy petition. In this connection Sir Raymond Evershed, M.R. had this to say in the case of *Re A Debtor. Ex Parte The Debtor* v. *Scott and Another* —

"... It has been argued by counsel for the debtor (and in my view correctly argued) that the petitioning creditor must establish that the debt on which his petition is founded was a debt presently payable and available to the petitioning creditor at the date of the act of bankruptcy — though he need not show that non-payment of the whole debt constituted the act of bankruptcy alleged. In order to make that point good, I will refer to two sections of the Bankruptcy Act, 1914. Section 4(1) provides:

A creditor shall not be entitled to present a bankruptcy petition against a debtor unless — (a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to £50, and (b) the debt is a liquidated sum, payable either immediately or at some certain future time...."

Section 5(2) provides:

"At the hearing (of the petition) the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and if satisfied with the proof, may make a receiving order in pursuance of the petition.

It is well known that bankruptcy is a matter which not only affects the debtor and his status, but it also affects the general public, and the court, therefore, has a duty to see that all the requirements, either express or implicit in the statute, have been strictly observed. The statute itself makes it quite plain that the petitioning creditor's debt, i.e., the debt on which the petition expresses itself as founded, must be proved to be existing and have the quality and character mentioned in section 4, both at the date when the petition was presented, and at the date of the hearing.... I think there is a further requirement which emerges from what has been called the common law of bankruptcy, i.e., the rules or principles which the courts have held to be applicable in bankruptcy proceedings, though in terms this requirement does not appear to be expressly stated in the statute. The requirement, in my judgment, is that the petitioning creditor's debt must also be shown to have existed and to have the necessary character and quality stated in section 4 at the date of the act of bankruptcy as well as at the dates of the presentation and hearing of the petition...."

It may be pointed out here that sections 4(1) and 5(2) referred to in the above quotation are *in pari materia* with sections 5(1)(a) and (b) and 6(2) of the Bankruptcy Act 1967.

In the course of his judgment Sir Raymond Evershed, M.R. referred to the case of *Re Debtors (No. 669 of 1926)*[3] and quoted its headnote as follows:—

"In order to constitute a good petitioning creditor's debt the debt must be a liquidated sum, payable either immediately or at some certain future time at the date of the act of bankruptcy. It is not sufficient that the debt should have become a liquidated sum in the interval between the date of the act of bankruptcy and the presentation of the petition."

In the case of *Re Debtors (No. 669 of 1926)* itself Lord Hanworth, M.R. after referring to decided cases said —

"The decisions in those cases show that there must be at the date of the act of bankruptcy an available debt payable and due from the debtor, and therefore, under section 4 of the Bankruptcy Act, 1914, the creditor is not entitled to present a bankruptcy petition against the debtor unless the debt is a liquidated sum."

In the present case the bankruptcy notice and the bankruptcy petition had each two blank items in respect of interest ordered to be paid by the debtor to the two creditors so that it could not be said that the debts mentioned in the bankruptcy notice and in the bankruptcy petition were liquidated sums within the meaning of section 5(1)(a) and (b) of the Bankruptcy Act at the date of the act of bankruptcy as well as at the dates of the presentation and hearing of the petition. For this reason too the bankruptcy notice and the bankruptcy petition were bad, irregular and of no effect.

Miss Khaw Yew-Mei for the petitioning creditors cited the case of *Rengasamy Pillai* v. *Comptroller of Income Tax*[4] and submitted that if there was any irregularity in the issue of the bankruptcy notice and the bankruptcy petition that irregularity could be cured under section 131 of the Bankruptcy Act which reads as follows:—

"No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."

I agree that section 131 is available to cure formal defects or irregularities in bankruptcy proceedings but I do not agree that the irregularities in the present proceedings before me were formal defects or irregularities of a kind which could be cured under that section. In the case of *Rengasamy Pillai* the bankruptcy notice which was served on the appellant was not issued and expressed to be issued by the Chief Justice in the name of the Yang di-Pertuan Agong as required under section 7(1) of the Courts of Judicature Act 1964. The Privy Council was of the view that any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it was served was a formal defect and validated by section 131 of the Bankruptcy Ordinance 1959 which is in the same terms as sections 131 of the Bankruptcy Act 1967. In dismissing the appeal their Lordships observed that it had been freely conceded that

the defect in the bankruptcy notice which was served upon the appellant was of this kind and it was accordingly validated by section 131.

The position was very much different in the proceedings before me. There was no question here of any formal defect or irregularity in the bankruptcy notice or in the bankruptcy petition. The petitioning creditors had jointly issued the bankruptcy notice against the debtor despite the absence of any provision entitling them to do so under the Bankruptcy Act and they had failed to indicate in the notice as well as in the petition that the debt owing by the debtor was a liquidated sum payable either immediately or at some certain future time. This amounted to flagrant disregard of the provisions relating to the issue of the bankruptcy notice and the bankruptcy petition. In my judgment section 131 of the Bankruptcy Act was wholly irrelevent and inapplicable to the present case and could not be called in aid to validate the bankrupty notice and the bankruptcy petition which contained serious and fundamental defects. Even if section 131 was applicable I was of the view that the defects and irregularities in the bankruptcy notice and in the bankruptcy petition were not formal defects or irregularities but were serious enough to render the bankruptcy notice and the bankruptcy petition incurable under the section. I accordingly set aside both the bankruptcy notice and the bankruptcy petition and ordered the petitioning creditors to pay the costs of the proceedings to the applicant.

Bankruptcy notice and bankruptcy petition set aside.

Solicitors: *N. Ramachandran & Co.; Joseph & Son.*